

# CONSISTENCY AND PREDICTABILITY IN INTERNATIONAL TRIBUNALS DECISION ON MARITIME DELIMITATION CASES FROM 2009 TO 2019

Faudzan Farhana

The Center for Political Studies, Indonesian Institute for Sciences, Indonesia  
Correspondence: [faudzanfarhana@gmail.com](mailto:faudzanfarhana@gmail.com)

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## Abstract

*The rules of maritime delimitation are of paramount importance in the law of the sea because coastal states will not be able to effectively exercise their legal uses of the sea without definite boundary. However, as customary law, Articles 15, 74 and 83 of UNCLOS did not provide much guidance in any particular delimitation case. Meanwhile, concluded bilateral agreements had not created enough practice of law to qualify as customary law. Thus, it is left to the international tribunals to form the delimitation rules. However, cases decided by the international tribunals show a lack of consistency in applying two main methods based on relevant provisions of UNCLOS. Both equidistance and the equitable principle has been used on plenty of occasions, as well as other criteria. This study aims to examine whether the approach of international tribunals to maritime delimitation cases has become more predictable and consistent during 2009-2019. Limited to the cases decided by the ICJ, ITLOS, and PCA, the study found that there is no significant deviation from the application of Article 15 UNCLOS within the proceedings of the cases. However, the unpredictability of the decision in the Ghana/Cote d'Ivoire case shows that the Court is more focus on the consistency of methodology than principle matter. In applying Article 74 and 83 UNCLOS, the Tribunals also put more effort into ensuring a consistent methodology. However, plenty of discretion also available for the Tribunals. Although such discretion is crucial, it needs to utilise carefully to maintain the consistency and predictability of the law. Without the consistent interpretation and predictable translation of UNCLOS from the International Tribunals, it is impossible to preserve the Law of Maritime Delimitation.*

**Keywords :** *Equidistance, Equitable, International Tribunals, Maritime Delimitation*

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Submitted : 31 July 2020 | Revised : 24 September 2020 | Accepted : 8 October 2020

## I. INTRODUCTION

The rules of maritime delimitation are of paramount importance in the law of the sea because coastal states will not be able to effectively exercise their legal uses of the sea without a definite boundary.<sup>1</sup> According to international law, every state is free to agree on how to determine their maritime boundaries.<sup>2</sup>

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<sup>1</sup> Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012), 86. Also Andrew Cannon, *The Impact of Sovereignty and Boundary Disputes on Commercial Investments* (Herbert Smith Freehills, 2016); Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (Martinus Nijhoff Publishers, 2005), 245.

<sup>2</sup> Article 33, Charter of the United Nations and Statute of the International Court of Justice (UN Charter). Also Malcolm Evans, "Maritime Boundary Delimitation" in *Oxford Handbook on the Law of the Sea*, Tim Stephens and others, eds (Oxford University Press, 2015), 255; Donald R

However, if negotiation failed, they may choose other peaceful means, including judicial settlement.

Maritime delimitation is a complicated subject since it usually involves political claims and interests of the parties which need to be balanced with the legal facts to achieve an equitable solution for all. Mainly there are three issues in the delimitation process: source of authority, principal methods to carry out the delimitation, and technicality to determine the actual lines in space.<sup>3</sup> Therefore, generic solutions will never exist. Each case should be treated individually and have enough flexibility in order to give an equitable solution for the case.

However, although flexible consideration of relevant factors is necessary, the law of maritime delimitation should also have a certain degree of predictability, as all types of law.<sup>4</sup> Articles 15, 74 and 83 of United Nations Convention on the Law of the Sea (UNCLOS) recognised as reflecting customary international law. But, they did not provide much guidance on achieving an equitable result in any particular delimitation case.<sup>5</sup> Meanwhile, concluded bilateral agreements had not created enough practice of law to qualify as customary law. Hence, it is left to the international tribunals to formulate the legal rules and principle that govern the law of maritime delimitation.<sup>6</sup>

Initially, there are two main methods of maritime delimitation under international law. The first one used the “equidistance” method in which the maritime boundary between the States must follow “the median line of which is equidistance from the nearest point” on the coast.<sup>7</sup> While the method was generally acceptable in determining territorial sea between states with opposite coasts, it could yield an inequitable solution in different maritime areas.<sup>8</sup> Therefore, the second methods which focus more on creating equitable

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Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing Ltd 2010) 2-29; and Tanaka, *Ibid*, 16-19.

<sup>3</sup> Prescott and Schofield, *The Maritime Political Boundaries of the World*, 216.

<sup>4</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing, 2006) Also Kem Thompson Frost, “Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities” *Baylor Law Review* 67, (2015): 48.

<sup>5</sup> Rodman R Bundy, “Preparing for a delimitation case: the Practitioner’s view” in *Maritime Delimitation*, Rainer Lagoni and Daniel Vignes, eds (Martinus Nijhoff Publishers 2006), 95. Also Tafsir Malick Ndiaye, “The judge, maritime delimitation and the grey areas,” *Indian Journal of International Law*, 55 (2015): 593-533, doi: 10.1007/s4090101600272.

<sup>6</sup> Tanaka, *Predictability and Flexibility*, 348; Bundy, “Preparing for a delimitation,” 95.

<sup>7</sup> Gilbert Guillaume, *Speech by His Excellency Judge Gilbert Guillaume*, President of the ICJ to the Sixth Committee of the General Assembly of the United Nations, (2001), 3.

<sup>8</sup> Tanaka, *Predictability and Flexibility*, 33.

results were proposed. Despite the different nature of each area to delimit, both methods apply to all types of cases.<sup>9</sup>

The International Court of Justice (ICJ) first called upon to rule on territorial sea delimitation using the equidistance and special circumstances methods in *Qatar and Bahrain* case. Before this case, the method most often effected through bilateral agreements between States. The Court proceeds in two stages, determining the equidistance line first, and later identifying the available special circumstances to obtain equitable results, following article 15 UNCLOS, article 12 TSC, and the customary international law.<sup>10</sup> However, unlike delimitation case between opposite states such as Qatar and Bahrain, practice in determining territorial sea boundary of adjacent states has been less consistent. Both equidistance and the equitable principle has been used on plenty of occasions, as well as other criteria.<sup>11</sup> Inconsistency also shown in the delimitation of continental shelf and the EEZ. For example, in the *North Sea Continental Shelf*<sup>12</sup> case, the case between *Tunisia and Libya*<sup>13</sup>, and later in the *Gulf of Maine* case<sup>14</sup>, where the Court applied equitable principles to achieve an equitable solution. The increasing application of equitable principles creates uncertainty on whether maritime delimitation law still exists.<sup>15</sup> Hence, it encourages the Courts to put more attention on developing the maritime delimitation law that is more predictable and consistent.

This study aims to examine whether the approach of international courts and tribunal to maritime delimitation case has become more predictable and consistent in the last ten years. This examination is vital because consistency and predictability ensure that the international courts and tribunals have enforced the rule of law fairly for the parties, not only procedurally but also substantially. To be able to conduct the examination, the Author will look on seven cases decided by the ICJ, the International Tribunal on the Law of the

<sup>9</sup> Guillaume, *Speech*, 3.

<sup>10</sup> Maritime Delimitation and Territorial Questions between Qatar and Bahrain, ICJ Reports 2001, 5 at 41.

<sup>11</sup> Other criteria: the use of a line perpendicularly to the general direction of the coast, or following the line of latitude passing through the point where the land boundary meets the sea.

<sup>12</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and The Netherlands), ICJ Report 1969, 53 at 101.

<sup>13</sup> Case concerning Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ Reports 1982, 4.

<sup>14</sup> Case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), ICJ Reports 1984, 300 at 112.

<sup>15</sup> Alex G Oude Elferink et al, "The Judiciary and the Law of Maritime Delimitation" in *Maritime Boundary Delimitation: The Case Law Is It Consistent and Predictable?*, Oude Elferink and others, eds, (Cambridge University Press, 2018) 21; Also Guillaume, *Speech*.

Sea (ITLOS), and Permanent Court of Arbitration (PCA) during 2009 to 2019 time frame. Although the focus of the examination will be limited to the seven cases, the discussion will also include some older cases as they generated principles that form the law of maritime delimitation throughout the time.

The examination structured into four sections. The first section aims to provide a general introduction, in which it introduces the basic concept and methodology. After that, the examination of the cases will separate into two different maritime zones, namely the territorial sea (second section) and the continental shelf and the Exclusive Economic Zone -EEZ (third section) due to its differences on the legal attributes. The fourth section will include a general conclusion of the study.

## A. THE CONCEPT OF MARITIME DELIMITATION LAW

Maritime delimitation defined as “the process of establishing *lines* separating the spatial ambit of coastal state jurisdiction *over maritime space* where the *legal title overlaps* with other states.”<sup>16</sup> Therefore, one should distinguish between maritime limits and maritime delimitation. While the maritime limits comprise the maritime boundary of a single state, maritime delimitation is a situation where two or more states attempts to separate overlapping areas over the same maritime spaces.<sup>17</sup> Hence, while the establishment of maritime limits is a unilateral act, maritime delimitation must be based on an agreement between States.<sup>18</sup> Further, as the authority is limited to states, it excludes the delimitation issues among the members of federations. Thus, international organisations, such as the International Seabed Authority, are not subject to maritime delimitation.<sup>19</sup>

During the development of maritime delimitation law, there are four types of maritime delimitation:

1. Delimitation of the territorial sea between States with opposite or adjacent coasts.
2. Delimitation of the contiguous zones.
3. Delimitation of the EEZ between states with opposite or adjacent coasts.
4. Delimitation of the Continental Shelf between states with opposite or adjacent coasts.

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<sup>16</sup> Tanaka, *Predictability and Flexibility*, 187 [emphasis added].

<sup>17</sup> L Calisch, “The Delimitation of Marine Spaces between States with Opposite and Adjacent Coasts” in *A Handbook on the New Law of the Sea*, R J Dupuy and D Vignes, eds, (Nijhoff, 1991), 426–427.

<sup>18</sup> Tanaka, *Predictability and Flexibility*, 8. Also ICJ, the Gulf of Maine case, para. 112

<sup>19</sup> Tanaka, *Ibid*.

These types of delimitation are different according to the different nature of each maritime zone. A state enjoys “permanent sovereignty” over their natural resources within territorial sea (including internal waters, archipelagic waters) and in the international straits.<sup>20</sup> While in the continental shelf and EEZ (including the contiguous zone and fishery zones (FZ)<sup>21</sup>), their sovereignty over natural resources takes forms of exclusive sovereign rights.<sup>22</sup>

However, the recent trend shows that States are likely to determine their continental shelf and EEZ boundary by a single maritime boundary because there is a parallelism of the continental shelf and EEZ represented in the article 74 and 83 of the UNCLOS.<sup>23</sup> Although the proponent of separate regimes of the continental shelf and EEZ has been proposed several points to shows the difference between the two regimes,<sup>24</sup> relevant judicial practise shows that even though these two regimes are separate, a single maritime boundary can still be drawn to avoid the practical problems that could arise.<sup>25</sup>

## B. METHOD AND LIMITATION OF STUDY

Discussion will divide into two separate sections based on the division of

<sup>20</sup> Danae Azaria, “Energy Activities at Sea within National Jurisdiction” in *Natural Resources and the Law of the Sea*, Martin and others, eds (International Law Institute, 2017), 150; Also Rothwell and Stephens, *Law of the Sea*, 88, 117; Tanaka, *Predictability and Flexibility*, 126, 142; Gemma Andreone, “The Exclusive Economic Zone” in Tim Stephens et al, eds (Oxford University Press, 2015), 159-180; Ted L McDorman, “The Continental Shelf” in Tim Stephens et al, eds (Oxford University Press, 2015), 181-202;

<sup>21</sup> The exclusive fishing zone or fishery zone refers to an area beyond the territorial sea (12 nm from the baselines) in which the coastal State has the right to fish, subject to any concessions which may be granted to foreign fishers Theoretically, FZ is a part of EEZ. For more elaboration on the FZ, see Shalva Kvinikhidze, “Contemporary Exclusive Fishery Zones or Why Some States Still Claim an EFZ,” *The International Journal of Marine and Coastal Law* 23, vol.1 (2008): 271-295, doi:10.1163/092735208X272238.

<sup>22</sup> Rothwell and Stephen, *The Law of the Sea*, 88-117.

<sup>23</sup> Dundua Nugzar, *Delimitation of Maritime Boundaries between Adjacent States* (United Nations, 2007), 5; Also Surya P Sharma, “The Single Maritime Boundary Regime and the Relationship between the Continental Shelf and the Exclusive Economic Zone,” *International Journal of Estuarine and Coastal Law*, vol.2(4) (1987): 203-226, doi:10.1163/187529987x00257.

<sup>24</sup> i.e Continental shelf is set to be the natural prolongation of the land territory to some extent of distance, while EEZ does not require the natural prolongation criteria, only cover certain distance; Further, as continental shelf is a natural prolongation, states right over continental shelf exist *ipso facto* and *ab initio*, while EEZ on the other hand, need to be declared before a state can claim over the area. Sharma, *Ibid*, 209-210. Also Barbara Kwiakowska, “Equitable Maritime Boundary Delimitation - A Legal Perspective,” *International Journal of Estuarine and Coastal Law*, vol.3(4) (1988): 295-298.

<sup>25</sup> For example in the case where one Party have rights over the water column and the other rights over the seabed and subsoil below that water column such as in ICJ, Qatar/Bahrain, para 173; Also Barbados and the Republic of Trinidad and Tobago, Arbitral Tribunal Award 2006, para 227.

maritime zones, namely the delimitation of territorial sea and the delimitation of the EEZ and the Continental Shelf (CS). However, the discussion on EEZ and CS will be limited to the areas within 200 nm from the baselines of the coastal States. The discussion will not cover the CS beyond 200nm. For cases where a single maritime boundary is requested, the delimitation will discuss separately according to the maritime areas in question. Nevertheless, in the case of there is a concurrent claim,<sup>26</sup> such as in *Ghana/ Côte d'Ivoire* case and *Peru v. Chile*, it will discuss as a whole either under the Territorial Sea Delimitation or the EEZ and Continental Shelf Delimitation section. The discussion will limit to see whether there is consistency on the way the decision made by the international courts/tribunals in maritime delimitation case during the last ten years. When examining the cases, the Author will look first on the law applicable to the maritime delimitation. Then, analyse the application of the law in deciding the case to see whether there is consistency on the court's consideration in deciding the case. Other issues than the maritime delimitation, such as Ghana's responsibility in the *Ghana/ Côte d'Ivoire* case or land boundary disputes as in *Costa Rica v. Nicaragua* case as well as sovereignty over maritime feature in the *Nicaragua v. Colombia*, will not be covered.

## II. TERRITORIAL SEA DELIMITATION CASES

From 2009 to 2019, The ICJ, ITLOS and PCA have decided seven cases. The list of the cases are in the table below:

**Table 1 List of Cases Decided by ICJ, ITLOS, and PCA from 2009-2019**

ICJ	Subject Matter
Maritime Delimitation in the Black Sea (Romania v. Ukraine) 2004-2009	Single maritime boundary delimiting the continental shelf and exclusive economic zones between adjacent States
Territorial and Maritime Dispute (Nicaragua v. Colombia) 2001-2012	delimitation of the exclusive economic zone and of the continental shelf between opposites States

<sup>26</sup> Refer to claim to both territorial sea (which related to the sovereignty of a state) and to EEZ and the continental shelf (where only provides sovereign rights to the coastal state) as explained in David Anderson and Youri van Logchem, "Chapter 7: Rights and obligations in areas of overlapping maritime claims" in *The South China Sea Disputes and Law of the Sea*, Jayakumar and others, eds (Edward Elgar Publishing, 2014), 192-228.

Maritime Disputes (Peru v Chile) 2008-2014	Maritime Boundary between adjacent States
Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) 2014-2018	Delimitation of the territorial sea and Delimitation of the exclusive economic zone and continental shelf between adjacent States
ITLOS	
Case No. 16 Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) 2010-2012	Maritime Boundary in respect of Territorial Sea, EEZ, and Continental Shelf between Adjacent States
Case No. 23 Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire) 2017	Single Maritime Boundary between adjacent States
PCA	
Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India 2009-2014	Delimitation of Territorial Sea, Continental Shelf, and EEZ between adjacent States

Source: Author's compilation, 2019

However, there are only four cases that specifically dealt with the delimitation of the territorial sea, as will be discussed in the next sub-sections.

#### A. DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN BANGLADESH AND MYANMAR IN THE BAY OF BENGAL (BANGLADESH/MYANMAR) 2012

The ITLOS Judgement in the *Bangladesh/Myanmar* case (the *Bay of Bengal* case) is essential for two reasons: It is the first decision on the delimitation of the continental shelf beyond 200 nm,<sup>27</sup> and it is also the first maritime boundary delimitation decided by ITLOS.<sup>28</sup> The parties request the

<sup>27</sup> Will not be discussed in this paper. M Shah Alam and Abdullah Al Faruque, "The Problem of Delimitation of Bangladesh's Maritime Boundaries with India and Myanmar: Prospects for a Solution," *The International Journal of Marine and Coastal Law* 25, (2010):405; and Marcin Kaldunski and Tadesz Wasilewski, "The International Tribunal for the Law of the Sea on Maritime Delimitation: The Bangladesh v Myanmar Case," *Ocean Development & International Law* 45, issue 2, (2014):123-170, doi:10.108/00908320.2014.898920.

<sup>28</sup> Bjarni Mar Magnusson, "International Tribunal for the Law of the Sea," *The International*



ITLOS to delimit territorial sea, a single maritime boundary delimiting the EEZ and continental shelves of the Parties and the continental shelf beyond 200 nm from the parties' baselines.

## 1. General Consideration

Bangladesh and Myanmar are parties to the UNCLOS and have made a declaration under Article 287(1) of the convention to accept the jurisdiction of the Tribunal to settle the dispute between them. Hence, the ITLOS has jurisdiction to delimit maritime boundary between the parties based on Article 15, 74, and 83 of the UNCLOS as the law applicable to the delimitation.<sup>29</sup>

## 2. Territorial Sea Delimitation

As UNCLOS is the applicable law, both principle of equidistance and the equitable result might apply to this case. Bangladesh and Myanmar are adjacent to each other in which, practice on previous cases has been less consistent. Therefore, to examine whether or not there is an inconsistency in the court consideration, we should follow the steps that the ITLOS had taken.

### a. Prior Agreement

Following article 15 of UNCLOS, the first step taken by the ITLOS is to check the existence of a prior agreement between Bangladesh and Myanmar on their maritime boundary. Bangladesh argues that the Parties have delimited their territorial sea, either by signing the Agreed Minutes in 1974 and 2008 or by tacit agreement evidenced by affidavits from Bangladesh fishermen, Navy and Coast Guard. Further, the conduct of the parties also creates a situation of estoppel<sup>30</sup> as if there was a delimitation of the maritime zones between the parties.<sup>31</sup>

However, after careful examination, the ITLOS considers that the terms and circumstances of 1974 Agreed Minutes show that it was merely a record of conditional understanding that is not intended to create a binding legal

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*Journal of Marine and Coastal Law* 27, (2012):623.

<sup>29</sup> Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Reports 2012, 23 at 48, 49, 50.

<sup>30</sup> Bangladesh asserts that Myanmar is estopped from claiming that 1974 agreement is not valid and non-binding as she enjoyed the benefits of 1974 Agreement, similarly to Thailand in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand), where Thailand is estopped to assert that she did not accept the [French map] as she has enjoyed benefits from the treaty for over fifty years. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), ICJ Reports 1962, 6, at 32.

<sup>31</sup> ITLOS, Bangladesh/Myanmar, para. 56



obligations or commitments.<sup>32</sup> Therefore, it was concluded that the Minutes do not constitute an independent commitment between the parties. Meanwhile, the affidavits provided merely represent the opinions of private individuals on a specific occasion, not the existence of an agreed boundary.<sup>33</sup> Hence, the claim of estoppel is also rejected.

b. Historic Title and/or Special Circumstances

Neither Bangladesh nor Myanmar suggested that it had a historic title to any of the waters concerned. However, Myanmar argued that St. Martin's Island was a special circumstance since it lies immediately off the coast of Myanmar. If it is given a full effect as an island, it will lead to considerable distortion of the general configuration of the coastline.<sup>34</sup> However, the ITLOS see no compelling reasons that would justify treating the island as a special circumstance or preventing it from being given full effect.<sup>35</sup> Hence, the ITLOS draw an equidistance line from the low water lines along their coasts. Interestingly, the line drawn by the ITLOS "essentially the same as that contemplated by" the parties in the 1974 Agreed Minutes.<sup>36</sup>

To sum up, ITLOS shows consistency in the application of equidistance and the equitable result principle on the Territorial Sea Delimitation between Bangladesh and Myanmar by checking the existence of a prior agreement and special circumstances before draw an equidistance line by considering geographical technicalities between parties.

## B. BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN BANGLADESH AND INDIA 2014

Following the background in the *Bangladesh/Myanmar* case, on October 8, 2009, Bangladesh initiated an arbitration proceeding based on Annex VII of the UNCLOS. It requested that the tribunal identify the Land Boundary Terminus (LBT) between Bangladesh and India and delimit overlapping areas of the territorial sea, EEZ, and continental shelf within and beyond 200nm of the two States.<sup>37</sup>

<sup>32</sup> *Ibid* para. 92-93

<sup>33</sup> *Ibid* para. 113

<sup>34</sup> *Ibid*, para. 131-132

<sup>35</sup> *Ibid*, para 151-152

<sup>36</sup> Joint Declaration of Judges *ad hoc* Mensah and Oxman, para. 2

<sup>37</sup> Maritime Boundary Arbitration between Bangladesh and India, PCA Award, 1, para.1. *Also:* Marcin Kaldunski, "A Commentary on Maritime Boundary Arbitration between Bangladesh and India Concerning the Bay of Bengal," *Leiden Journal of International Law* 28, (2015):799; and DH Anderson, "Bay of Bengal Maritime Boundary (Bangladesh v India)," *American Journal of International Law* 109, no.1, (2015):146-154, doi:10.5305/amerjintelaw.109.1.0146.

## 1. General Consideration

Bangladesh and India are parties to the UNCLOS, but neither of them has made a declaration under Article 287 (3) UNCLOS.<sup>38</sup> Thus, both parties were deemed to accept arbitration based on Annex VII of the UNCLOS. The Tribunal has jurisdiction to identify the location of LBT based on the Radcliffe Award, to delimit the territorial sea, the EEZ and continental shelf within and beyond 200 nm in the overlapping claims of the Parties.<sup>39</sup>

## 2. Territorial Sea Delimitation

In the absence of agreement between Parties, the delimitation of the territorial sea is governed by article 15 UNCLOS. However, the Parties disagree on the interpretation of the provision and their application.<sup>40</sup> Bangladesh contends for the use of angle-bisector<sup>41</sup> methodology based on special circumstances, namely the head of the Bay of Bengal concavity, unstable coasts, and the risk of significant changes in base points. However, following the decision in *Bangladesh/Myanmar*, and after conducting a site visit, documentary review, and cartographic evidence, the Tribunal decides to use the median line/equidistance method.<sup>42</sup>

### a. The Land Boundary Terminus

First, the Tribunal drew a closing line across the estuary of the Haribhanga in the illustrative map, then identify the junction of the dash-dot-dash line with the closing line as it would have been drawn latter in 1947. It then transposed this point onto a modern chart.<sup>43</sup> The Tribunal unanimously decided that the transposed point was the terminus of the land boundary.<sup>44</sup> This solution cut through the uncertainties in the meaning of the boundary definition.<sup>45</sup>

### Special Circumstances

b. The terminus was not equidistant between the nearest points on the coasts of the parties due to the line followed the midstream of the main

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<sup>38</sup> PCA, *Bangladesh/India*, p.19, para. 65-66

<sup>39</sup> *Ibid*, p.20-23, para 67-83.

<sup>40</sup> *Ibid*, p. 15, para. 57

<sup>41</sup> The angle-bisector method is where the maritime boundary is drawn as the line bisecting the angle formed by the general direction of the coasts of the two States involved at the terminus of the land border. This method was used in the *Nicaragua v. Honduras 2007*; and some cases prior to 1993, such as the *Continental Shelf, the Gulf of Maine Area*, and *Delimitation of the Maritime Boundary between Guinea and Guinea-1985*.

<sup>42</sup> PCA, *Bangladesh/India*, 71 para.248 and Kaldunski, "A Commentary", 801.

<sup>43</sup> Anderson, "Bay of Bengal," 147

<sup>44</sup> PCA, *Bangladesh/India*, 52, para.186

<sup>45</sup> Anderson, "Bay of Bengal," 148

channel. The Tribunal regarded it as special circumstances based on article 15 UNCLOS. The Territorial Sea then adjusted to the median line based on equidistance. The Tribunal unanimously drew the territorial sea boundary as a 12nm geodetic line from the terminus of the land boundary until it met the median line, following the *Guyana v. Suriname* case.<sup>46</sup>

Although the case was one of few cases that involve the selection of LBT delineating land territory and internal waters from the territorial sea, the Tribunal show that there is enough predictability in applying Article 15 of UNCLOS. The use of the equidistance line in determining LBT that later addressed as special circumstances also shows that there is enough discretion for the Tribunal to reach an equitable solution between parties.

## C. DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN GHANA AND CÔTE D’IVOIRE IN THE ATLANTIC OCEAN (GHANA/CÔTE D’IVOIRE) 2017

### 1. General Consideration

The Special Chamber concludes dispute between Ghana and Côte d’Ivoire in respect to the territorial sea, the EEZ, and the Continental Shelf. As both parties have ratified the UNCLOS and since the case concerns the interpretation and application of articles 15, 74, 76, and 83 UNCLOS, the Chamber concludes that they have jurisdiction to delimit maritime boundaries between the Parties.

### 2. Territorial Sea Delimitation

#### a. Tacit Agreement and Estoppel

Ghana contends primarily that “this case is not a delimitation case, but rather a request to declare the existence of a boundary.”<sup>47</sup> Ghana argues that for more than five decades<sup>48</sup>, both parties have accepted the “principle of equidistance” as an equitable approach to the delimit their maritime boundary.<sup>49</sup> This fact in Ghana’s view is reflecting “tacit agreement” and estoppel based on acquiescence.

However, following the decision on the *Nicaragua v. Honduras*<sup>50</sup>case,

<sup>46</sup> *Guyana v. Suriname*, PCA Award 2007, p. 103, para. 323

<sup>47</sup> Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote D’Ivoire in the Atlantic Ocean (Ghana/Cote D’Ivoire), ITLOS 2017, p.29, para. 69

<sup>48</sup> From 1957 to 2009.

<sup>49</sup> *Ibid*, p. 34, para.102.

<sup>50</sup> “that the evidence of a tacit legal agreement must be compelling and not easily presumed be-

the Chamber considers that the oil practice, no matter how consistent it may be, cannot in itself establish the existence of a tacit agreement on a maritime boundary.<sup>51</sup> As the decision in the *Indonesia/Malaysia* case shows that these may have been simply the manifestation of the caution exercised by the Parties in granting their concessions.<sup>52</sup> Hence, it decided that there is no tacit agreement between the Parties to delimit their territorial sea, EEZ and continental shelf within and beyond 200nm.<sup>53</sup>

The Chamber notices that Côte d'Ivoire has taken care to indicate that the limits of its oil concession blocks are distinct from those of its maritime jurisdiction. Côte d'Ivoire also expressed its concern to Ghana from time to time about the continuation of oil activities in the area yet to be delimited. Therefore, the Chamber rejects Ghana's claim of estoppel.<sup>54</sup>

#### b. Interpretation of Article 74(3) and 83(3) UNCLOS

Article 74(3) and 83(3) calling for States concerned to make every effort to make a provisional agreement and not to jeopardize or hamper the process of reaching an agreement. However, in examining the conduct of the parties within the case between Ghana/Côte d'Ivoire, the Chamber concluded that the hydrocarbon activities carried out by Ghana in the disputed area is not constitute a violation of the sovereign rights of Côte d'Ivoire as **it was not determined yet** whether the area belongs to Côte d'Ivoire or Ghana.<sup>55</sup> This reasoning seems inverted since based on Article 74(3) and 83(3) the activities might jeopardizing or hampering the process of reaching an agreement, therefore, the Chamber should have tested this before establishing any delimitation.<sup>56</sup> The inverted decision raise question of the consistency of the Chamber in making consideration.

#### c. Single Maritime Boundary

The Parties agreed that the same delimitation methodology is used to delimit a single maritime boundary for their territorial seas, exclusive economic zones

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cause permanent maritime delimitation is an important grave matter." Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), ICJ Report 2007, p. 659, p.735.

<sup>51</sup> ITLOS, *Ghana/Cote D'Ivoire*, p. 67, para.215.

<sup>52</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia/Malaysia*), ICJ Reports 2002, p. 625, at p. 664, para. 79.

<sup>53</sup> ITLOS, *Ghana/Cote D'Ivoire*, p.71, para.228.

<sup>54</sup> *Ibid*, p.74-75, para. 244, 246.

<sup>55</sup> *Ibid*, p. 164, para. 593. [emphasize added]

<sup>56</sup> Youri van Logchem, "The Rights and Obligations of States in Disputed Maritime Areas: What Lessons Can Be Learned from the Maritime Boundary Dispute between Ghana and Cote d'Ivoire," *Vanderbilt Journal of Transnational Law* 52, (2019):121-177.

and continental shelves. However, they disagree on the method preferable. The Special Chamber follows the international jurisprudence concerning the delimitation of maritime spaces that, in principles, favours the equidistance/relevant circumstances methodology. Angle bisector methodology was due to particular circumstances in each of the case. Hence, with the absence of any compelling reasons, the equidistance/relevant circumstances methodology should be chosen for maritime delimitation.<sup>57</sup>

The Chamber also concluded that there is no relevant circumstance in the present case which would justify an adjustment of the provisional equidistance line after a careful examination on the concavity/convexity, the geography of Jomoro, location of resources, and conduct of the Parties.<sup>58</sup> Therefore, the delimitation line for the territorial sea, the exclusive economic zone, and the continental shelf within 200 nm determined following the points decided using equidistance lines.

Overall, the Chamber consistently apply relevant articles of UNCLOS in deciding the case between Ghana and Côte d'Ivoire. However, the unpredictability of the Chamber's interpretation of Article 74(3) and 83(3) UNCLOS question whether applying consistent methodology would guarantee the coverage of the delimitation principles.

## D. MARITIME DELIMITATION IN THE CARIBBEAN SEA AND THE PACIFIC OCEAN (COSTA RICA V. NICARAGUA) 2018

### 1. General Consideration

Costa Rica instituted proceeding against Nicaragua to establish a single maritime boundary between two States in the Caribbean Sea and the Pacific Ocean, delimiting all the maritime areas appertaining to each of them based on international law.<sup>59</sup> Costa Rica also submits case concerning *The Northern Part of Isla Portillos*, which is about a land boundary. Thus, it will not be discussed further in this paper. The basis of the Court's jurisdiction is Article 36 (2) and (5) of the Statute and Article XXXI of the Pact of Bogota.<sup>60</sup> In delimiting the maritime areas, respective provisions in the UNCLOS are applicable for the case.

### 2. Territorial Sea Delimitation

<sup>57</sup> Judgement (n59) p.4, at p.86, para.317

<sup>58</sup> Ibid, p. 117-135, para.411-479

<sup>59</sup> Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), ICJ Reports 2018, p. 8 , para. 1

<sup>60</sup> Ibid, p. 24, para. 45

a. In the Caribbean Sea

*Starting-point and Equidistance Line*

Both parties disagree on the starting-point of the land boundary in the Caribbean Sea. The Court decided that due to natural threat of erosion in the mouth of San Juan River, it deems appropriate to place a fixed point at a distance of 2 nautical miles from the coast at sea rather than on the land.<sup>61</sup> From that, the parties agreed that it is necessary to establish an equidistance line using a two-stages approach that was approved by the Courts.

*Special Circumstances*

The combined effect of the concavity of Nicaragua's coast west of the mouth of the San Juan River and of the convexity of Costa Rica's coast east of Harbor Head Lagoon does not represent an exceptional circumstance that could justify an adjustment of the median line under Article 15 of UNCLOS.<sup>62</sup> However, the Courts identify two particular circumstances that may adjust the provisional line, namely the high instability and narrowness of the sandspit near the mouth of the San Juan River and a sizeable territory appertaining to Nicaragua.<sup>63</sup> Accordingly, the Court decided that the delimitation line in the territorial sea is obtained by joining the fixed point at sea landwards and shall terminate at a point in which it represents equidistance from both parties.

b. In the Pacific Ocean

*Starting-point of the Maritime Delimitation*

Costa Rica and Nicaragua selected the same base point for the construction of the provisional median line in the present case. Thus, the Court sees no reason to depart from the base points selected by both Parties.<sup>64</sup>

*Special Circumstances*

The parties disagree on whether the configuration of the coast constitutes a special circumstance based on Article 15 of UNCLOS which would justify an adjustment of the provisional median line in the territorial sea. The Court concludes that the territorial sea in the Pacific Ocean shall be delimited between the Parties using a median line, starting at the midpoint of the closing line of Salinas Bay.

On both areas, despite the geographical differences, the Court seems consistent enough in determining the starting point following the principle of

<sup>61</sup> *Ibid*, p. 38, para. 86

<sup>62</sup> *Ibid*, p. 41, para.103

<sup>63</sup> *Ibid*, p. 41-42, para. 104-105

<sup>64</sup> *Ibid*, p.72, para.173

equidistance and then to adjust it according to special circumstances to reach equitable result for both parties.

#### E. GENERAL RESULT OF THE INTERNATIONAL TRIBUNALS DECISION ON TERRITORIAL SEA DELIMITATION

After going through all the four cases specifically dealt with the territorial sea, the study show result that can be presented in a table below:



Table 2 Examination of the Territorial Sea Delimitation Cases 2009-2019

No.	Case	Applicable Law	Method of Delimitation	Prior and /Tacit Agreement	Historic Title and/ Special Circumstances	Procedural Steps
1.	Bangladesh/ Myanmar 2012	UNCLOS Art.15	Equidistance method	Agreed minutes 1974 and 2008 as well as affidavits to prove tacit agreement provided by Bangladesh is concluded by the ITLOS as not sufficient to establish prior and/tacit agreement	<ul style="list-style-type: none"> <li>- Historic title is not available</li> <li>- Special circumstances proposed by Myanmar is not justified by the ITLOS</li> </ul>	<ol style="list-style-type: none"> <li>1. Check the existence of prior and/ tacit agreement.</li> <li>2. Check the existence of historic title and/special circumstances.</li> <li>3. Apply the equidistance method based on the geographical consideration.</li> <li>4. Check whether the equidistance line has satisfy as the equitable solution for both parties.</li> </ol>
2.	Bay of Bengal (Bangladesh/ India) 2014	UNCLOS Art. 15	Equidistance method	Both parties did not claim the existence of such agreement	<ul style="list-style-type: none"> <li>- The parties disagree on the interpretation of special circumstances as well as the method of delimitation</li> <li>- The Tribunal decided to use median line/equidistance method</li> <li>- The Tribunal regarded the terminus as special circumstances</li> </ul>	<ol style="list-style-type: none"> <li>1. Identify the Land Boundary Terminus through geographical consideration.</li> <li>2. Identify special circumstances in the form of the terminus.</li> <li>3. Apply the equidistance method and adjust the provisional line according to the special circumstances</li> <li>4. Ensure all the consideration has satisfy as the equitable solution for both parties.</li> </ol>

No.	Case	Applicable Law	Method of Delimitation	Prior and /Tacit Agreement	Historic Title and/ Special Circumstances	Procedural Steps
3.	Ghana/ Côte d'Ivoire 2017	UNCLOS Art.15, 74, 76, and 83 (request to set a single maritime boundary)	Equidistance method	The Chamber reject Ghana's claim that there has been tacit agreement between the Parties that provide an estoppel based on principle of acquiescence.	- The Chamber finds no historic title and/ special circumstances during the examination that will affect the identification and measurement of maritime boundary.  -	<ol style="list-style-type: none"> <li>1. Decide to use the same delimitation methodology for all the maritime spaces in question.</li> <li>2. Identify historic title and/ special circumstances that may affect the provisional line for all maritime spaces.</li> <li>3. Conclude that Ghana's hydrocarbon activities in the disputed area is not a violation of the sovereign rights of Côte d'Ivoire before decide the maritime boundary.</li> <li>4. Apply the equidistance method in consideration with all the geographical technicalities.</li> <li>5. Ensure all the consideration has satisfy as the equitable solution for both parties.</li> </ol>

No.	Case	Applicable Law	Method of Delimitation	Prior and /Tacit Agreement	Historic Title and/ Special Circumstances	Procedural Steps
4.	Caribbean Sea and the Pacific Ocean Costa Rica v. Nicaragua 2018	UNCLOS Art. 15	Both delimitation in the Caribbean Sea and the Pacific Ocean use Equidistance method	Both parties did not claim the existence of such agreement.	<ul style="list-style-type: none"><li>- In the Caribbean Sea there are two special circumstances that affect the provisional line.</li><li>- In the Pacific Ocean no special circumstances justify the adjustment of median line.</li></ul>	<ol style="list-style-type: none"><li>1. Identify the starting point of the land boundary in the Caribbean Sea.</li><li>2. Draw provisional line using equidistance method.</li><li>3. Identify special circumstances that may affect the provisional line based on geographical technicalities.</li><li>4. Adjust the provisional line and check whether it have satisfy as the equitable solution for both parties.</li></ol>

Source: Author’s examination, 2019

The result shows that Tribunal decisions from 2009 to 2019 show consistency in applying Article 15 of UNCLOS. Despite coming from different institutions, they all starting the examination using the equidistance method. Procedurally, the taken steps also show consistency where the Tribunals will first check the existing geographical and legal situation of the area before establishing a provisional line that can be adjusted for particular circumstances. On the substantial part, most of the cases also shows consistency in terms of reasoning of the decision made by the Tribunals as they follow the previous decision of the similar legal issues. However, one substantial point stand out in Ghana/Côte d'Ivoire where the Chamber for the first time elaborate Article 74(3) and 83(3) imply that hydrocarbon activities in disputed areas may not be deem as violation of the sovereign rights of another party because it is not determined as theirs yet. This decision shows that the intent of the Chamber to be consistent procedurally sometimes can not fulfill substantial consistency. In this case, the Chamber overlook the timeline set on the Article 74(3) and 83(3): "Pending Agreement as..." and focus on the sentence form of the Côte d'Ivoire's claim, which is a deviation on the usual step that used to be taken by the court in reasoning. This particular reasoning may need to be discussed separately in more extensive manner. Overall, the procedural and substantial consistency will automatically increase the predictability of the future decision in Territorial Sea delimitation cases.

### III. EEZ AND CONTINENTAL SHELF DELIMITATION CASES

#### A. MARITIME DELIMITATION IN THE BLACK SEA (ROMANIA V. UKRAINE) 2009

##### 1. General Consideration

Romania requested a single maritime boundary between the continental shelves and the EEZs of Romania and Ukraine in the Black Sea. Although both were parties to the UNCLOS, Romania brings the Court's jurisdiction under paragraph 4(h) of the Additional Agreement to the parties' Treaty on the Relations of Good Neighbourliness and Cooperation, 1997.<sup>65</sup> Ukraine did not contend but disagree on the scope of jurisdiction. Ukraine is of the view that the Court's jurisdiction was limited to determine the boundary of the continental shelf and EEZ and did not extend to a boundary involving the territorial sea.<sup>66</sup>

<sup>65</sup> Maritime Delimitation in the Black Sea (Romania v. Ukraine), ICJ Reports 2009, p. 7, para. 1

<sup>66</sup> *Ibid*, p. 71, para. 24. Also David H Anderson, "Maritime Delimitation in the Black Sea Case (Romania v. Ukraine)," *Law & Prac Int'l Cts & Tribunals* 8, (2009):305.

However, the Court found that the principles of delimitation in the 1997 Additional Agreement applied only to the negotiation of a boundary, not to a judicial determination. Therefore, the Court decided that the applicable law was the relevant provisions of UNCLOS, following Article 31 of the Vienna Convention on the Law of Treaties.

## 1. Single Maritime Boundary

### a. Existing Maritime Delimitation between the Parties

After careful consideration of several border treaties between the Parties, the Court concludes that 1949 instruments only related to the demarcation of State border between Romania and the Union of Soviet Socialist Republics (USSR). Since the USSR did not forfeit its entitlement beyond the 12nm limit of its territorial sea, there is also no agreement in force between Romania and Ukraine to delimit their EEZ and Continental Shelf.<sup>67</sup>

### b. Relevant Coasts and Areas

Since there is no agreement in force, the identification of relevant coast become crucial. It has two legal roles, to provide a particular context in case of overlapping claims within the zone and to ensure there is no disproportionality in the ratio of the coastal length and the maritime areas.<sup>68</sup> The Court concludes that all the Romanian coast are relevant for the delimitation and consist of 248 km in total length.<sup>69</sup> From there, the Court applies the principle of “land dominates the sea”<sup>70</sup> and that the coast “must generate overlap projection with the coast of the other party.”<sup>71</sup> Hence, the total length of Ukraine’s relevant coast is 705km.<sup>72</sup> Further, the Court finds it appropriate to include both the southwestern and the south-eastern triangles where maritime entitlements of Romania and Ukraine overlap in its calculation of the relevant area.<sup>73</sup>

### c. Delimitation Methodology

The Court used a three-stage approach in delimiting continental shelf and EEZ in a single maritime boundary following the *Continental Shelf* decision.<sup>74</sup> First, it established a provisional delimitation line using an equidistance line constructed from protuberant coastal points situated nearest to the area

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<sup>67</sup> ICJ, *Romania v Ukraine*, p. 89, para. 76

<sup>68</sup> *Ibid*, p. 89, para. 78

<sup>69</sup> *Ibid*, p. 93, para. 88

<sup>70</sup> ICJ, *The North Sea Continental Shelf*, p.51,p para.96

<sup>71</sup> ICJ, *The Continental Shelf*, p. 61, para. 75

<sup>72</sup> ICJ, *Romania v Ukraine*, p. 97-98, para. 100-103

<sup>73</sup> *Ibid*, p. 99-100, para. 110-114

<sup>74</sup> ICJ, *The Continental Shelf*, p.46, para. 60

to delimited.<sup>75</sup> Second, it considers whether there are factors calling for an adjustment of the line to achieve an equitable solution.<sup>76</sup> Finally, the Court will apply a disproportionality test to ensure that the line will not lead to inequitable result because of any marked disproportion between the ratio of the respective coastal length and the ratio between the relevant area of each States.<sup>77</sup>

#### d. Base Points and Relevant Circumstances

After careful consideration, the Court concludes the Sacalin Peninsula and the landward end of the Sulina dyke as base points on the Romanian coast, while Tsyganka Island, Cape Tarkhankut and Cape Khersones as base points on the Ukrainian coast.<sup>78</sup> The Court decided it inappropriate to select any base points on Serpents' Island for the construction of the provisional line as it would resulting in a judicial refashioning of geography.<sup>79</sup> The Court did not see any particular circumstances that would require an adjustment to the provisional line.

#### e. The Disproportionality Test

Following the decision in the *Guinea/Guinea-Bissau* case, the Court found that the Continental Shelf and EEZ allocations are not in proportion to the length of respective coastlines, but on the equitableness of the delimitation line, it has constructed.<sup>80</sup> After measuring the coasts based on their general direction, the Court concludes that there is no significant disproportionality based on the ratio of the respective coastal lengths and the ratio of the relevant area. The final result apportioned in half the delimitation areas, and the Court manages to draw an equitable division of the contested area by excluding Serpents' Island and Point X that was questionable by the Parties before.<sup>81</sup> Hence, no adjustment is required.

Overall, the Court shows that they put thorough consideration on the

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<sup>75</sup> Unless there are un compelling reasons that make it unfeasible in the particular case. ICJ, *Nicaragua v Honduras*, p. 745, para. 281

<sup>76</sup> Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002, p. 441, para. 288

<sup>77</sup> However, as it stated in Maritime Delimitation in the Area between Greenland and Jan Mayen, ICJ Reports 1993, p. 67, para. 64, the final check does not suggest that the respective areas should be proportionate to coastal length as the sharing out of the areas should be "the consequence of delimitation, not *vice versa*."

<sup>78</sup> ICJ, *Romania v Ukraine*, p. 105-108, para. 127-141, and p. 109, para. 142-148.

<sup>79</sup> *Ibid*, p.110, para. 149.

<sup>80</sup> Delimitation of the maritime boundary between Guinea and Guinea-Bissau, RIAA, Vol. XIX, pp. 183-184, paras. 94-95.

<sup>81</sup> Nilufer Oral, "International Court of Justice," *International Journal on Marine and Coastal Law* 25, (2010):115

application of the relevant provisions of UNCLOS in determining the single maritime boundary between Romania and Ukraine. The three-stage approach applied both the equidistance and equitable principle in the Court's consideration. By taking notes from *Greenland and Jan Meyen* case, the Court shows that the use of equidistance does not necessarily mean that the result should always be proportionate to the coastal length, as long as it deems equitable for both parties.

## B. TERRITORIAL AND MARITIME DISPUTE (NICARAGUA V. COLOMBIA) 2012

### 1. General Consideration

The proceedings between Nicaragua and Colombia began by the application of Nicaragua in respect of title to territory and maritime delimitation. Nicaragua based the Court jurisdiction from article XXXI of the American Treaty on Pacific Settlement 1948 (Pact of Bogota) and article 36 of the ICJ Statute.<sup>82</sup> However, Colombia raised preliminary objections to jurisdiction within the time limit set by article 79(1) Rules of the Court. The Court agreed with Colombia's objection that it has no jurisdiction over any dispute concerning San Andreas, Providencia, and Catalina under article XXXI of Pact of Bogota.<sup>83</sup> The Court confirmed its jurisdiction over the title to the seven remaining maritime features and the maritime delimitation.<sup>84</sup> After establishing Colombia's sovereignty over the maritime features based on *effectivités*, the Court examine the admissibility of Nicaragua's claim for delimitation of Continental Shelf and EEZ. Despite Colombia's contention, the Court decided that the claim is admissible as it is closely related to the first claim concerning the delimitation of the continental shelf.<sup>85</sup> Since Colombia is not a party to UNCLOS, the Court concludes that customary international law will be the applicable law, in which articles 74, 83, and 121 UNCLOS are to be considered declaratory of customary international law.<sup>86</sup>

<sup>82</sup> Territorial and Maritime Dispute (Nicaragua v. Colombia), ICJ Reports 2012, p. 11, para. 1

<sup>83</sup> Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objection 2003.

<sup>84</sup> For more discussion on the sovereignty over maritime features *see*: Maria Otero, "Problems in the Caribbean: The Absence of Finality to the Territorial Dispute in Nicaragua v. Colombia Will Have Negative Impacts in the Region," *University of Tasmania Law Review* 46, (2015):617; Triestino Mariniello, "International Decisions: Territorial and Maritime Dispute (Nicaragua v Colombia)," *American Journal of International Law* 107, no. 1 (2013):396-430; Naomi Burke, "Nicaragua v Colombia at the ICJ: Better the Devil You Don't," *Cambridge Journal of International and Comparative Law* 2, (2013):314; and Jianjun Gao, "A Note on the Nicaragua v. Colombia Case," *Ocean Development and International Law* 44, (2013):219.

<sup>85</sup> ICJ, Nicaragua v. Colombia, p. 664-665, para. 107-112

<sup>86</sup> *Ibid*, p. 673, para. 137-138



## 2. Maritime Delimitation Process

### a. Relevant Coasts

The Court began its process of delimitation by determining the relevant coast as a starting point to draw a single maritime boundary between the Parties. Following the established principle “land dominates the sea,” the Court determined that Nicaragua’s relevant coast was the mainland coast projecting into the area of overlapping entitlements. It measured the 200nm continental shelf and exclusive economic zone from the islands fringing the Nicaraguan coast, taking approximately 531 km in total length.<sup>87</sup> Colombia’s relevant coasts were limited to the islands over which Colombia has sovereignty (the most important are San Andrés, Providencia and Santa Catalina) and it estimated that the total length of the coast is 58 km.<sup>88</sup>

### b. Relevant Areas

The Courts avoid numerous other maritime boundaries in the Caribbean Sea and underlined that the decision would not prejudice the position of any third States in determining the relevant areas. The Court concludes that in the north, the relevant areas have been laid down in the *Nicaragua v. Honduras* judgement,<sup>89</sup> while in the south, the boundary of the relevant area begins in the east at the point where the line 200 nautical miles from Nicaragua intersects with the boundary line agreed between Colombia and Panama.<sup>90</sup>

### c. Method of Delimitation

The Court employed the “standard” method of delimitation involves a three-stage approach in determining a single maritime boundary between the Parties. First, the Court constructed a provisional median line between the relevant coasts of the parties. Then, a significant and complicated adjustment was applied to the provisional line based on the significant disparity in the lengths of the relevant coasts and the overall geographical context. The situation is complicated due to the necessity to not cut off a Party from the entire area where its coast projects.<sup>91</sup> At the third stage, the Court utilized the disproportionality test and concluded that the disproportion in the present case did not indicate an inequitable result to ensure an equitable solution.<sup>92</sup>

Similar to the previous case, the Court shows fair consistency and thus,

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<sup>87</sup> *Ibid*, p. 678, para. 145

<sup>88</sup> *Ibid*, 679-680, para. 151

<sup>89</sup> ICJ, *Nicaragua v. Honduras*, p. 659

<sup>90</sup> ICJ, *Nicaragua v. Colombia*, p. 686, para. 165

<sup>91</sup> ICJ, *Nicaragua v. Colombia*, p. 707-711, para. 229-237

<sup>92</sup> *Ibid*, p. 716-717, para. 243-247

enhance the predictability of the result by applying the three-stage approach on determining single maritime boundary between parties to ensure both equidistance and equitable principle are satisfied.

## C. DELIMITATION OF THE MARITIME BOUNDARY BETWEEN BANGLADESH AND MYANMAR IN THE BAY OF BENGAL (BANGLADESH/MYANMAR) 2012

### 1. General Consideration

Since the *Greenland/Jan Mayen* case, the international courts and tribunals have adopted a reasonably consistent methodology, known as the “equidistance/relevant circumstances” method to delimit a single maritime boundary between overlapping EEZs and continental shelves of opposite or adjacent states (except in the *Nicaragua/Honduras* case). The ITLOS recognise that there might be circumstances where the methodology could not be appropriate. However, as there is no exceptional situation, the ITLOS used this methodology instead of the angle-bisector method as suggested by Bangladesh.<sup>93</sup>

### 2. EEZ and Continental Shelf Delimitation

In delimiting the EEZ and Continental Shelf for the parties, the ITLOS use a three-stage approach in which it first selects the basepoints, then considering relevant circumstances, and conduct proportionality test to ensure the equitable result.

#### a. Selection of Basepoints

In the construction of the provisional line, the ITLOS was not obliged to follow the base points indicated by the parties and could decide its own, based “on the geographical facts of the case.”<sup>94</sup> ITLOS decided to not using St. Martin’s Island as a base point because it would result in a line that blocked the seaward projection from Myanmar’s coast. Instead, it choose two base points on Bangladesh’s coast and four on the coast of Myanmar, where start from a point midway in the mouth of the Naaf River, the equidistance line was then constructed.<sup>95</sup>

#### b. Relevant Circumstances

The ITLOS was aware that due to the concavity of Bangladesh’s coast,

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<sup>93</sup> ITLOS, Bangladesh/Myanmar, p. 234-239

<sup>94</sup> *Ibid*, p.72 para. 264. This approach follows the courts and tribunals practice in past cases. Also RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press, 1999), 40 and Alam and Faruque, “*The problem*,” 411-412.

<sup>95</sup> ITLOS, Bangladesh/Myanmar, p. 72 paras. 264-265, p. 76 para. 272-274.

the provisional equidistance line should be adjusted to prevent a cut-off effect on Bangladesh's maritime projection and would not result in achieving an equitable solution as mandated by articles 74 and 83 UNCLOS.<sup>96</sup> Therefore, the direction of the adjusted provisional equidistance line did not look substantially different from a geodetic line starting at an azimuth 215', which Bangladesh argued before.<sup>97</sup>

### c. The Proportionality Test

This test involves comparing the ratio of the areas accumulate to each party from the first two-stage of delimitation with the ratio of their respective relevant coasts. The ITLOS carried out this test after it had delimited the boundary of the continental shelf beyond 200nm. Based on an exercise involving mathematical precision, the ITLOS found that there was no significant disproportion of the allocated maritime areas to the parties. Therefore, no adjustment on the equidistance line required to ensure an equitable solution.<sup>98</sup>

Thus the ITLOS can ensure the essence of consistency and predictability of the EEZ and Continental Shelf delimitation fulfilled.

## D. BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN BANGLADESH AND INDIA 2014

### 1. General Consideration

The parties agreed that the Tribunal should establish a single maritime boundary for both the EEZ and the continental shelf. Thus, the applicable law was is Articles 74, 83, and 76 UNCLOS. However, they disagree on the method of delimitation. While Bangladesh prefers the bisector of an angle between the two coasts, India supported the three-stage equidistance/relevant circumstances method, following the *Black Sea* case.<sup>99</sup> Nevertheless, both have set out their version of the relevant portions of their coasts for the Tribunal.

The Tribunal notices that the principles underpinning the identification of the relevant coast are well established.<sup>100</sup> The Tribunal then reject the angle-bisector method after reviewed Article 74 and 83 UNCLOS as well as the case law on delimitation method.<sup>101</sup>

<sup>96</sup> *Ibid*, p.81 para.293.

<sup>97</sup> *Ibid*, p.89 para. 334 this was also noted in Separate Opinion of Judge Gao, p.21, para 53.

<sup>98</sup> *Ibid*, p.126 para. 499.

<sup>99</sup> ICJ, *Romania v. Ukraina*, p.101 para.117.

<sup>100</sup> *Ibid*, para.99; ICJ, *The North Sea Continental Shelf*, p. 3, p.52, para.69; also ICJ, *The Continental Shelf*, p. 61, para. 75.

<sup>101</sup> PCA, *Bangladesh v. India*, p.99, para.345.

## 2. Single Maritime Boundary for the EEZ and the Continental Shelf

### a. Provisional Equidistance Line

The Tribunal following the same criteria applied in the territorial sea delimitation constructed a provisional line to delimit EEZ. Five base points were selected for the EEZ.<sup>102</sup>

### b. Relevant Circumstances

There are two groups of relevant circumstances: geographical and non-geographical categories.<sup>103</sup> Bangladesh asserts that double concavity, the cut-off effect, coastal instability, and fisheries are called for an adjustment of the provisional equidistance line.<sup>104</sup> Following the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*<sup>105</sup> in which the Court emphasized that the purpose of adjusting an equidistance line is not to refashion geography or to compensate nature inequalities, the Tribunal dismissed the last two circumstances.

Complying the ITLOS decision in *Bangladesh/Myanmar* case, the Tribunal sees that concavity *per se* is not necessarily a relevant circumstance. However, if there is a cut-off effect as a result of the concavity, then an adjustment of the line may be necessary to achieve an equitable result. Hence, an adjustment of the provisional equidistance line must be made to avoid an unreasonable cut-off effect to the detriment of Bangladesh. However, the adjustment can only be conducted after the examination of the Parties arguments on the delimitation of the area beyond 200nm.<sup>106</sup>

It is then showed that by consistently applying the previous method that had been implemented in delimiting the EEZ and Continental Shelf cases, the ITLOS could create a sense of predictability of the equitable result for both parties.

## E. MARITIME DELIMITATION IN THE CARIBBEAN SEA AND THE PACIFIC OCEAN (COSTA RICA V. NICARAGUA) 2018

Costa Rica and Nicaragua requested the Court to determine a single maritime line delimiting their EEZ and continental shelf. The Court began

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<sup>102</sup> *Ibid.*, para. 365-366.

<sup>103</sup> Malcolm D Evans, "Maritime Delimitation and Expanding Categories of Relevant Circumstances," *The International and Comparative Law Quarterly* 40, no.1, (1991):1-33; Also Kaldunski and Wasilewski, "Bangladesh v. Myanmar," 137-140.

<sup>104</sup> PCA, *Bangladesh v. India*, 110-112, para.380-386.

<sup>105</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports 1982, 30 para. 46.

<sup>106</sup> PCA, *Bangladesh v. India*, 123, para. 421.

its proceedings based on Article 74 and 83 UNCLOS by using a three-stage approach.

## 1. In the Caribbean Sea

The Court started with determining the relevant coast in the present proceeding. Notwithstanding that both Parties take different approaches to determine it, they both reached nearly identical solutions. However, the Court concludes that the length of the relevant coast should be measured based on their natural configuration.

After measuring the relevant coast, the Court moves to decide relevant base points to construct the provisional line, including Corn Island. Despite Nicaragua's argument that the attribution of Corn Islands as an island will affect the adjusted delimitation, the Court ensures that it would not do so by giving them only half effect as an adjustment. The appropriation produces an adjustment of the equidistance line in favour of Costa Rica.<sup>107</sup> Finally, as the ratio comparison of the coastal length does not show any marked disproportion, the Court concludes that the delimitation concerning the exclusive economic zone and the continental shelf between the Parties in the Caribbean Sea shall follow the line as decided in the adjustment of the provisional line.<sup>108</sup>

## 2. In the Pacific Ocean

Similar steps also applied in delimiting single maritime boundary in the Pacific Ocean. In considering the relevant coasts and area, the Court notes that the Parties' positions do not differ significantly in the identification of Nicaragua's relevant coast. However, the Parties' arguments concerning Costa Rica's relevant coast differ significantly. The Court then used straight lines in two segments of Costa Rica's relevant coast to decide.<sup>109</sup> Other parts that are not relevant for delimitation also excludes during this process.

Parties had selected appropriate base points for drawing provisional equidistance line in the Pacific Ocean. They all begin at the end of the boundary in the territorial sea and approved by the Court.<sup>110</sup> After that, the Court should deal with two issues to adjust the provisional line: potential inequitable cut-off of Nicaragua's coastal projections due to the existence of Santa Elena and the Nicoya Peninsula.<sup>111</sup> To achieve an equitable solution, the Court concluded that the provisional equidistance line must be adjusted by giving half effect to

<sup>107</sup> *Ibid*, p. 59, para. 154

<sup>108</sup> *Ibid*, p. 67, para. 166

<sup>109</sup> *Ibid*, p. 76, para. 181

<sup>110</sup> *Ibid*, p. 82, para. 188

<sup>111</sup> *Ibid*, p. 85, para. 192

the Santa Elena Peninsula. Since placing base points on the Nicoya Peninsula does not lead to an inequitable solution, the Court also finds that no adjustment is necessary.

These steps show that although the Court has to maintain consistency in term of the method, sufficient discretion for the Court is still available. Especially in terms of determining the basepoints, relevant coast and specific adjustment to the provisional line. Such discretion is vital to ensure the equitable result for both parties.

## F. MARITIME DISPUTES (PERU V CHILE) 2014

### 1. General Consideration

Peru initiated proceedings to the ICJ to seek delimitation of its maritime boundary with Chile in the Pacific Ocean. She invokes the Court's jurisdiction based on article XXXI of the 1948 American Treaty on Pacific Settlement. Chile has ratified the UNCLOS, but Peru is not a party.<sup>112</sup>

### 2. Maritime Delimitation

Peru and Chile disagree on the existence of a maritime boundary between them. Peru argues that no agreed maritime boundary exists between the two countries. She requested the Court to plot a boundary line using the equidistance method in order to achieve an equitable result. However, Chile contends that the 1952 Santiago Declaration established an international maritime boundary for starting-point of the Peru-Chile land boundary and extending to a minimum of 200 nautical miles. It further relies on several agreements and subsequent practice as evidence of that boundary. Chile asks the Court to confirm the boundary line accordingly.<sup>113</sup>

Before settling the dispute, the Court ensures on whether an agreed maritime boundary exists. After carefully examining the extensive list of evidence provided by the parties, the court concludes that there is an agreed maritime boundary between the parties extended to 80 nm along the parallel of its starting-point.<sup>114</sup> The Court also concluded that the starting point of the maritime boundary between the Parties is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line.<sup>115</sup> Then, the Court established the provisional equidistance line that runs in general south-wet direction, almost in a straight line, until it reaches the

<sup>112</sup> Maritime Dispute (Peru v. Chile), ICJ Reports 2014, p. 3 para.1

<sup>113</sup> *Ibid*, p. 16, para. 22

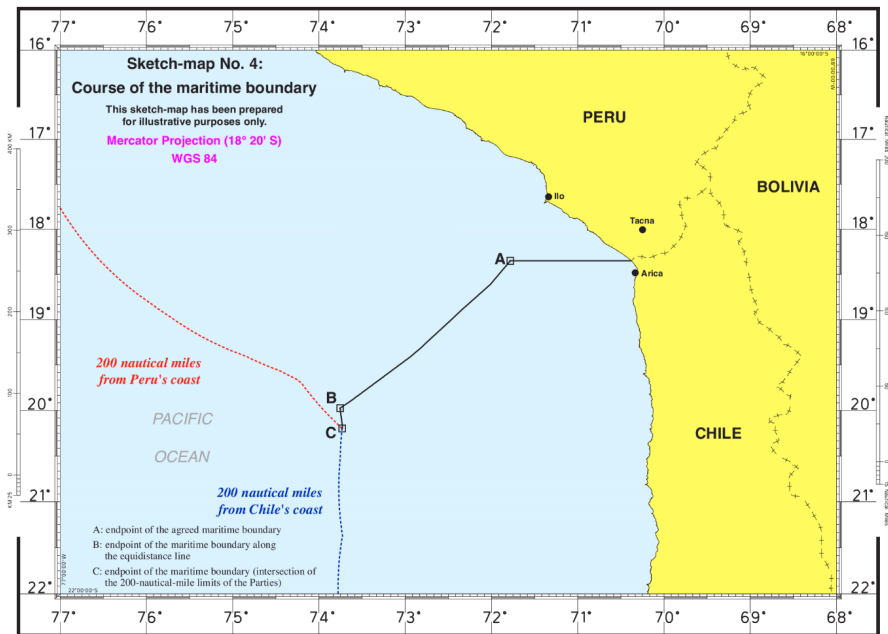
<sup>114</sup> *Ibid*, p. 58, para. 151; Also Abhimanyu George Jain, "Maritime Disputes (Peru v Chile)," *American Journal of International Law* 109, no.2 (2015):379-386.

<sup>115</sup> *Ibid*, p. 64, para. 176

200nm limit measured from the Chilean baselines.<sup>116</sup>

However, as there is no relevant circumstances appear on the Court, no basis for adjusting the provisional equidistance line.<sup>117</sup> The Court accordingly concludes that the maritime boundary between the two Parties from Point A (the previous starting point) runs along in general southwest direction almost straight line to Point B (200nm from the Chilean Baselines). Then along the 200-nautical-mile limit measured from the Chilean baselines to Point C, where the 200nm limits of the Parties' maritime entitlements intersect. (See Map).

**Figure 1. Course of Maritime Boundary between Peru and Chile**



Source: *Maritime Disputes (Peru v Chile)*, Judgement, 2014

The Court again shows how consistent use of methodology will be able to resolve a complicated delimitation case and deliver an equitable solution for both parties. Hence, preserving the quality of maritime delimitation law as a trustworthy option for States.

<sup>116</sup> Ibid, p. 67, para. 186

<sup>117</sup> Ibid, p. 69, para. 161



## G. GENERAL RESULT OF THE INTERNATIONAL TRIBUNALS DECISION ON THE EEZ AND CONTINENTAL SHELF CASES

There are six cases that request the help of international tribunals to settle their maritime boundary disputes regarding the EEZ and Continental Shelf. Four of them request a single maritime boundary delimiting both areas. The study result show as follow.

Table 3 Result of the Examination of EEZ and Continental Shelf delimitation cases 2009-2019

No.	Case	Applicable Law	Method of Delimitation	Existing Maritime Delimitation	Base Points and Relevant Circumstances	Relevant Coasts and Areas
1.	Romania v. Ukraine 2009	UNCLOS Art.74 and 83 (Single Maritime Line)	Equidistance method using 3 stages approaches: 1. Establish provisional delimitation line. 2. Consider factors calling for adjustment. 3. Apply disproportionality test to ensure the equitable result.	The Court concludes that there is no agreement in force between Romania and Ukraine to delimit their EEZ and CS.	1. Base points for Romanian coast: the Sacalin Peninsula and the landward end of the Sulina dyke. 2. Base points for Ukraine coast: Tsyganka Island, Cape Tarkhankut, and Cape Kherstones. 3. No other relevant circumstances	- All Romanian coast are relevant for the delimitation. - Apply Land dominates the sea principle and overlap projection to calculate relevant coast of Ukraine. - Both southwestern and south-eastern triangles

2.	Nicaragua v. Colombia 2012	Customary international law, in which Art. 74, 83, and 121 UNCLOS are considered declaratory of customary international law. (Single Maritime Line)	Equidistance method with 3 stages approach: 1. Construct provisional median line. 2. Adjust the line based on geographical factors. 3. Apply disproportionality test to ensure the equitable result.	The Court concludes that there is no agreement in force between Nicaragua and Colombia to delimit their EEZ and CS.	1. Base points for Nicaragua is all its coast 2. Base points for Colombia is the western coasts of the relevant Colombian islands opposite the Nicaraguan coasts.	<ul style="list-style-type: none"> <li>- Relevant areas in the North sides have been laid in Nicaragua v. Honduras judgement.</li> <li>- In the South, the area begins in the east at the point where the 200nm lines from Nicaragua intersects with the boundary line agreed between Colombia and Panama.</li> </ul>
3.	Bangladesh/ Myanmar 2012	UNCLOS Art. 74, 76, and 83	Equidistance/relevant circumstances using 3 stages approach: 1. Select base points. 2. Consider relevant circumstances. 3. Conduct proportionality test to ensure the equitable result.	The Tribunal decide that evidence of existing maritime delimitation provided by Bangladesh is not inclusive.	1. Two base points on Bangladesh's coasts 2. Four base points on Myanmar's coasts 3. Then the equidistance line is starting from a point midway in the mouth of the Naaf River.	No other relevant factors that requires adjustment from the provisional line.

4.	Bay of Bengal Bangladesh and India 2014	UNCLOS Art. 74, 76, and 83 (Single Mari- time Line)	Equidistance method, following the criteria applied in the delimita- tion of territorial sea.	The Parties did not claim the existence of existing mari- time delimitation	<ol style="list-style-type: none"> <li>Three base points in Bangladesh: B-2. At Pussur Point, and at Shahpuri point.</li> <li>Two base points in India: I-2 and I-3.</li> </ol>	<p>The relevant area comprises 406,833 square kilometres. The allocation as follows: 106,613 square kilometres of the relevant area to Bangladesh and approximately 300,220 square kilometres of the relevant area to India. The ratio of the allocated areas is approximately 1 : 2.81.</p>
5.	Costa Rica v. Nicaragua 2018	UNCLOS Art. 74 and 83 (Single Mari- time Line)	<p>Equidistance method using 3 stages approach:</p> <ol style="list-style-type: none"> <li>Decide relevant base points to construct provisional median line.</li> <li>Adjust the provisional line based on other relevant factors</li> <li>Conduct proportionality test to ensure the equitable result.</li> </ol>	The Parties did not claim the existence of existing maritime delimitation	<ol style="list-style-type: none"> <li>In the Caribbean Sea: Base points on Corn Islands — Base points on Paxaro Bovo and Palmenta Cays</li> <li>In the Pacific Ocean: adopt base points selected by the parties.</li> </ol>	<p>- In the Caribbean Sea: Entire mainland coast of Costa Rica, mainland coast of Nicaragua up to Punta Gorda (north), coasts of Corn Islands that do not face north.</p> <p>- In the Pacific Ocean: All Nicaraguan coast, Costa Rican coast running along straight lines connecting Punta Zacate, Punta Santa Elena, Cabo Velas, Punta Guiones and Cabo Blanco, Costa Rican coast running along straight lines connecting Punta Herradura, Osa Peninsula, Punta Llorona and Punta Salsipuedes.</p>

6.	Peru v Chile 2014	1929 Treaty of Lima between Chile and Peru, 1947 Proclamations of Chile and Peru, Twelve instruments negotiated by Chile, Ecuador and Peru.	Equidistance method using 3 stages approach:  1. Construct provisional equidistance line.  2. Identify relevant circumstances calling for adjustment of the provisional line.  3. Conduct proportionality test to ensure equitable solution.	The Court concludes that the boundary that is agreed in 1954 Special Maritime Frontier Zone Agreement is an all-purpose one	1. Point A at a distance of 80 nautical miles from the coast along the parallel.  2. Base point on the Chilean coast will be situated near the starting-point of the maritime boundary between Chile and Peru, and on the Peruvian coast at a point where the arc of a circle with an 80-nautical-mile radius from Point A intersects with the Peruvian coast.  3. The north-west of the initial base point on the Peruvian coast and south of the initial base point on the Chilean coast.	- No basis for adjusting the provisional equidistance line
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Source: Author’s examination, 2019

## IV. CONCLUSION

After reviewing the seven cases decided by the ICJ, ITLOS, and PCA from 2009 to 2019, the Author conclude that:

From 2009 until 2019, there is no significant deviation from the application of article 15 UNCLOS within the proceedings of the cases. As it shows on the cases, the international Courts/Tribunals started the proceedings with ensuring whether there is a prior or tacit agreement concluded between the Parties. Then, the base points (or the LBT in other cases) were determined, and special circumstances were identified. Although the Courts/Tribunals mentioned that it is possible to utilise angle-bisector on compelling reasons, all cases within ten years back resort to the method of median equidistance line. Hence, we can conclude that in term of methodology, the case law within the ten years back shows that the international court and tribunal has adopt consistent practice in delimiting the territorial boundary.

The consistency in the practice of law will positively affect the predictability of the provisions. However, a note should be taken from the Ghana/Cote d'Ivoire case, where the Chamber for the first time elaborate the article 74(3) and 83(3) UNCLOS. The reasoning behind the decision to permit Ghana's unilateral conduct before boundary delimitation may create questions on the Courts/Tribunals predictability as the decision deems not to follow the sequence on interpreting the provision. The unpredictability of the decision shows that the Court is more focus on the consistency of methodology rather than principle matter.

As regard the maritime boundary delimitation of the continental shelf and the EEZs, the cases also show that the Courts/Tribunals put more effort in making sure that they applied a consistent methodology in delimiting the areas in question. The Black Sea case upheld the use of a three-stage approach which consistently followed by the subsequent cases. However, noting from the cases, the Author sees that there is plenty of discretion for the Courts/Tribunal in delimiting maritime areas, such as in interpreting the relevant provisions of the UNCLOS and translating it into more technical delimitation process. Although such discretion is vital to ensure equitability of the decision, it needs to utilise carefully to maintain the consistency that may enhance the predictability of the law.

UNCLOS might be the primary legal framework to solve issues related to the law of the sea. Yet, without the consistent interpretation and predictable translation of the International Tribunals, it is impossible to preserve the Law of Maritime Delimitation. In the end, maritime delimitation is not about the best methodology to delimit a boundary, but rather a trustworthy mechanism to achieve an equitable solution from a complex boundary dispute in a peaceful manner.

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